No. 04-163

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LINDA LINGLE, GOVERNOR OF THE STATE OF HAWAII, AND MARK J. BENNETT, ATTORNEY GENERAL OF THE STATE OF HAWAII,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii

SUPPLEMENTAL BRIEF FOR PETITIONERS 1

CONCLUSION..... 5

TABLE OF AUTHORITIES

CASES

Page(s)

Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003) 2
Kelo v. City of New London, 843 A.2d 500 (Conn. 2004), *cert. granted*, ___U.S. ___, 2004 WL 2069452 (Sept. 28, 2004) (No. 04-108) 3
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 3
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 2
Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 2

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This Court's decision on September 28, 2004, to grant review in *Kelo v. City of New London, Connecticut*, No. 04-108, highlights the importance of the distinct, but closely-related questions raised by this case and makes the need for review in this case even more compelling. *Kelo* involves a challenge under the "public use" requirement to a municipality's exercise of eminent domain, whereas this case involves an allegation that state legislation constituted a regulatory taking because the law did not "substantially advance" a state interest. Although the two cases address different aspects of the Just Compensation Clause, they both involve the same fundamental question of whether and to what extent the Clause places substantive limitations (not simply compensation requirements) on government action. A grant of review in this case as well as *Kelo* would afford the Court

the opportunity to (1) provide a more cohesive clarification of the role of the Clause (if any) as a basis for invalidating governmental action and (2) avoid the confusion that might arise if the Court addressed this larger issue solely in the eminent domain context.

The close doctrinal relationship between the "public use" requirement and the purported "substantially advance" test for a regulatory taking makes a comprehensive resolution of these issues highly desirable. As the language of the Just Compensation Clause makes clear, the public use requirement applies both in condemnation cases and in inverse condemnation cases. Moreover, as this Court noted in *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), the requirement that a governmental exercise of the taking power serve a valid public use essentially looks to the "legitimacy" of the government's action, *id.* at 232. The public use requirement thus does involve an inquiry into the validity of governmental action, albeit under a highly deferential standard. In the decision below, however, the Ninth Circuit invoked the "substantially advance" test, which also involves an inquiry into the legitimacy of government action, not as a prerequisite for a taking claim, but as an independent test, based on a heightened standard of review, for determining whether a taking has occurred.

The two doctrines are thus in significant tension with each other: on the one hand, an action that does not serve a legitimate public use cannot effect a "taking" at all within the meaning of the Just Compensation Clause, whereas the "substantially advance" test ostensibly makes the alleged illegitimacy of government action the very basis for finding a taking. This case, taken with *Kelo*, offers the Court the chance to make clear that, in *every* taking case, the substantive validity of the government's action is a *threshold* requirement, encapsulated in the concept of public use, rather than a "touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 635 n.* (2001) (O'Connor, J., concurring) (whether enactment or application of regulation constitutes a valid exercise of the police power is distinct from question whether government action requires payment of compensation).

A grant of review in this case as well as in *Kelo* also would be highly desirable because both cases raise distinct but related questions regarding the proper standard for judicial review of governmental actions under the Just Compensation Clause. In *Kelo*, petitioners embrace, as "one plausible means of giving the public use requirement substance" (*Kelo v. City of New London*, No. 04-108, Pet. 29), the position taken by the dissenting judges in the Connecticut Supreme Court that whether a proposed exercise of the taking power will provide public benefits should be determined as a question of fact, without deference to the legislature's judgment on that point, and under an elevated standard of review ("clear and convincing evidence"). *Kelo v. City of New London*, 843 A.2d 500, 588 (Conn. 2004) (Zarella, J., concurring in part and dissenting in part). In this case, the Ninth Circuit employed a similar approach to determine whether, as a matter of "predictive fact," Hawaii Act 257 would benefit the public. A grant of review in both cases will thus ensure that the standard of review under the Just Compensation Clause is developed in a cohesive fashion. The Court has already noted a linkage between the standard of review in the eminent domain context and in the regulatory takings context. Indeed, the Court's decisions suggest that the test for determining whether a state regulation is a regulatory taking should not involve heightened scrutiny of the validity of the regulation *precisely because* the public use doctrine imposes a (modest) requirement that the action be legitimate. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 511 n.3 (1987) (Rehnquist, J., dissenting).[1] But as the decision of the Ninth Circuit in this

[1] Ironically, the Ninth Circuit's decision in this case also perceived a linkage between the standard of review for public use determinations and

case demonstrates, it is far from clear that the lower courts apprehend the proper relation between these two aspects of the Just Compensation Clause. As a result, and as the State's petition has shown, there is widespread doctrinal confusion in the lower courts about the proper standard to be used in applying the purported "substantially advance" test.

Finally, unless the Court grants review in this case as well as in *Kelo*, the confusion surrounding the "substantially advance" test will remain, and indeed might well be exacerbated, regardless of the outcome in *Kelo*. On the one hand, regardless of how the Court resolves the standard of review issue in *Kelo*, the lower courts may not be able to rely on that determination to resolve the confusion about the standard of review in the regulatory takings context.[2] On the other hand, to the extent the Court's resolution of the standard of review issue in *Kelo* would influence the standard applied by the lower courts in regulatory cases, the confusion and conflict in regulatory takings law may simply be compounded. The Court's recent decisions strongly suggest that the "substantially advance" test may not be a valid takings test at all. It would be awkward, at best, for the Court to offer even indirect guidance on the standard of review that should be used in applying a test that may not exist without addressing the underlying question of the validity of that test.

The Court should not decide *Kelo* based on possibly incorrect assumptions about whether means-ends scrutiny is

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that for alleged regulatory takings, albeit in the opposite direction: the Ninth Circuit believed that deferential review was appropriate for exercises of eminent domain accompanied by payment of just compensation for the affected property owner, but not for regulatory claims in which the question is whether the government *should* pay compensation. Pet. App. 15, 59-60.

[2] The Ninth Circuit, for example, perceived no conflict between a highly deferential standard of review for condemnation cases and a heightened standard of scrutiny under the purported substantially advance test for regulatory taking claims.

appropriate at all in this setting, a question on which this Court has repeatedly expressed its uncertainty. *See* Pet. 9-12. The State therefore respectfully submits that the Court should not hold this case for *Kelo*, but should grant review in this case as well and should set the two cases for oral argument together. A grant of review in this case as well as *Kelo* will provide the Court with the opportunity to give the lower courts guidance about the proper standard in all takings claims, whether involving per se takings such as eminent domain or alleged regulatory takings.

CONCLUSION

For these reasons, the State of Hawaii believes that this Court's grant of review in *Kelo* makes even more clear the need for granting certiorari in this case.

Respectfully submitted,

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